In the Supreme Court of the United States

October Term, 1972

No. 72-1473

UNITED STATES OF AMERICA, PETITIONER

v.

EDMUND HERMAN ROTHFELDER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-1474

UNITED STATES OF AMERICA, PETITIONER

v.

ALLAN RAY KING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

The government's petitions for certiorari in these cases raise important issues regarding the construction of the recently amended Criminal Appeals Act (18 U.S.C. 3731) and the scope of the Double Jeopardy

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Clause.[1] Relying on the clear language of Section 3731, the legislative history of the 1971 amendments to the Criminal Appeals Act (84 Stat. 1890), and the decisions of this Court holding that the Double Jeopardy Clause does not bar an appeal from a pre-trial dismissal of an indictment before jeopardy has attached, we demonstrated that the courts below plainly misconstrued Section 3731 and the Double Jeopardy Clause.

The briefs filed by respondents in opposition do not rely on the language of the Criminal Appeals Act nor do they controvert our reading of the legislative history. Likewise they do not even attempt to distinguish such cases as *United States* v. *Celestine,* 215 U.S. 278, 283, and *United States* v. *Blue,* 384 U.S. 251, 253, holding that an appeal in these circumstances was not barred by the Double Jeopardy Clause. They instead raise several insubstantial arguments, only two of which require a brief response.

1. Respondent King argues that the hearing on his motion to dismiss the indictment pursuant to F.R. Crim. P. Rule 12(b)(2) was "in effect a trial to the court without a jury" (Br. p. 5) and that the dismissal constituted an "acquittal" from which an appeal is presumably barred by the Double Jeopardy Clause. But the reason the hearing was not "in effect a trial"

[1] Contrary to respondent Rothfelder's claim, the holding below goes well beyond "a very narrow class" of cases (Br. p. 6). While the decision was in the context of a Selective Service case, the holding was not limited to that case and would apply to pre-trial dismissals in all cases not based on a defect in the indictment.

was that the district court judge had no power to enter a guilty verdict on the evidence he heard and therefore respondent King was never in fact in jeopardy of conviction. Moreover, as we have shown at pp. 15–17 of our petition in *United States* v. *Rothfelder,* No. 72–1473, the action of the district court judges here does not come under the definition of "acquittal" prescribed in *United States* v. *Sisson,* 399 U.S. 267, 290, n. 19.

The only cases upon which respondent King relies, as he concedes, were "all decisions construing Section 3731 prior to its amendment" (Br. p. 6). But Congress amended Section 3731 for the express purpose of overcoming the construction placed on the Criminal Appeals Act by those very cases.

2. Respondent Rothfelder suggests that there "would be an adverse impact on the administration of federal criminal justice if the decision below were to be upset" (Br. p. 5). He argues that permitting an appeal from a pre-trial dismissal will discourage the use of pre-trial motions which permit prompt disposition of cases which do not involve disputed factual issues. There is, however, no basis in fact for such an assumption, particularly since many such pre-trial motions must be raised prior to trial or be deemed to have been waived. F.R. Crim. P. Rule 12(b)(2). Moreover, Congress has made the policy determination to permit appeals in these circumstances, and that determination governs in the absence of any constitutional impediment. Respondent's argument is simply that the government should have no

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recourse when a district judge commits legal error in passing on a pre-trial motion, but Congress has decided not to leave the criminal justice system unbalanced in that way.

3. We also wish to bring to the attention of the Court several recent cases which indicate the growing conflict and uncertainty regarding the application of the Criminal Appeals Act and the reach of the Double Jeopardy Clause. The Court of Appeals for the Second Circuit, relying on the legislative history of the Criminal Appeals Act and the directive of Congress that Section 3731 "be liberally construed to effectuate its purposes," has held that it has jurisdiction to hear an appeal from a dismissal of indictment on double jeopardy grounds. *United States* v. *Goldstein*, No. 73–1165, decided May 25, 1973 (C.A. 2) (App. A, *infra*, pp. 1a–17a). In rejecting arguments similar to those accepted by the courts of appeals below, the Second Circuit stated (App. A, *infra*, pp. 7a–8a):

> At the outset, appellees claim that the Government cannot appeal from Judge Weinstein's order dismissing the indictment on double jeopardy grounds. The 1970 amendments to the Criminal Appeals Act, enacted as Title III, § 14 of the Omnibus Control Act of 1970, P.L. 91–644, 84 Stat. 1880, 1890, 91st Cong., 2d sess., were designed to eliminate much of the tortuous statutory construction, e.g., *United States* v. *Sisson*, 399 U.S. 267 (1970), and *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (9th Cir. 1959) (en banc), to which federal courts had been put in interpreting the coverage of the

> predecessor act. See S. Rep. No. 91–1296, 91st Cong., 2d sess., at 2 (1970). But a principal purpose of the amendments was to broaden considerably those situations in which the Government could appeal. Id. While the predecessor act was to be strictly construed against the Government's right to appeal, e.g., *United States* v. *Sisson, supra,* 399 U.S. at 291, the present statute expressly directs that its provisions "shall be liberally construed to effectuate its purposes." [Footnote omitted.]

See, also, *United States* v. *Castellanos,* No. 72–2337, May 4, 1973 (C.A. 2) (App. B, *infra,* pp. 18a–27a), holding that the 1971 amendments to the Criminal Appeals Act were "aimed" at "mak[ing] the government's right to appeal coextensive with its ability to retry the defendant if its arguments on the merits should prevail on review" (App. B, *infra,* p. 21a).

The rationale of these cases is wholly inconsistent with the holdings below, and the arguments made by respondents, that the 1971 amendments to the Criminal Appeals Act did not make any substantial change with regard to the government's right of appeal.

Another recent decision, however, appears to lend some support to the claim that the Double Jeopardy Clause would preclude an appeal from a pre-trial order dismissing any indictment based on a determination of the "general issue" in the case, *i.e.,* whether the defendant committed the acts alleged in the indictment. In *United States* v. *Hill,* 473 F. 2d 759 (C.A. 9), the district court granted a pre-trial motion to dismiss an indictment in an obscenity case on the ground

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that the material at issue was as a matter of law not obscene. The court of appeals held that the dismissal based on "evidence going to the general issue" barred further prosecution (473 F. 2d at 762). The majority based its decision on *United States* v. *Oppenheimer,* 242 U.S. 85, where it was held that under the doctrine of *res judicata* a final order dismissing an indictment on statute of limitations grounds barred a subsequent prosecution for the same offenses.[2]

The Ninth Circuit's reliance on *United States* v. *Oppenheimer, supra,* was misplaced. While the doctrine of *res judicata* would, no doubt, bar subsequent prosecution after the merits of a particular controversy had been finally determined in favor of a defendant, it plainly does not preclude an appeal from the initial order dismissing the indictment.[3] And, indeed, both prior to and after the holding in *Oppenheimer,* this Court has entertained appeals from pretrial dismissals on statute of limitations grounds. See

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[2] This Court there held, however, that the Double Jeopardy Clause "did not apply in terms" to bar such reprosecution where jeopardy had not attached (242 U.S. at 88).

[3] *Ashe* v. *Swenson,* 397 U.S. 436, in which the Court held that the doctrine of collateral estoppel was incorporated in the Double Jeopardy Clause, is likewise inapposite here. Clearly, where a verdict of acquittal entered by a jury necessarily determined certain issues in favor of an accused, the Double Jeopardy Clause could not be avoided by charging the defendant with another offense which required relitigation of the same issue that the prior proceeding, in which jeopardy attached, had resolved in the defendant's favor. It does not follow from this that an appeal from the termination of the prosecution prior to trial, before jeopardy attached, is barred.

United States v. *Goldman*, 277 U.S. 229; *United States* v. *Rabinowich*, 238 U.S. 78.

We believe that *United States* v. *Hill*, *supra*, was wrongly decided and intend to file a petition for certiorari in that case. In any event, however, the holding there would not avail respondents because the determination of the district courts here, unlike in *Hill*, was not predicated on the "general issue" in the case, but was based on a defense which was "capable of determination without the trial of the general issue" (Rule 12(b)(1)). See pp. 15–17 of our petition for certiorari in *United States* v. *Rothfelder*, No. 72–1473. In the present setting, therefore, it is even more clear that there was no jeopardy at the pre-trial hearings and no bar to an appeal from the district courts' rulings.

CONCLUSION

For the reasons stated in our petition and this reply brief, it is respectfully submitted that the petitions for writs of certiorari should be granted.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1973.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 796—September Term, 1972.

(Argued April 19, 1973 Decided May 25, 1973.)

Docket No. 73-1165

UNITED STATES OF AMERICA,

Appellant,

—against—

ALBERT GOLDSTEIN, ALFRED CAESAR, SAM JACOBSON, MURRAY GELLER and ROBERT WISCH,

Appellees.

Before:

CLARK, *Associate Justice,**
WATERMAN and FEINBERG, *Circuit Judges.*

Appeal by the United States under 18 U.S.C. § 3731 from an order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *J.*, dismissing an indictment.

Reversed.

MICHAEL B. POLLACK, Attorney, Department of Justice (Dennis E. Dillon, Attorney, Department of Justice; Robert A. Morse, United States Attorney for the Eastern District of New York; L. Kevin Sheridan, Assistant

* Retired Associate Justice of the Supreme Court of the United States, sitting by designation.

United States Attorney, on the brief) *for Appellant.*

THOMAS J. O'BRIEN, New York, N. Y. (Kostelanetz & Ritholz, James M. La Rossa, Joseph E. Brill, on the brief) *for Appellees Goldstein, Caesar, Jacobson and Geller.*

JEROME LEWIS, New York, N.Y. (H. Elliot Wales, on the brief) *for Appellee Wisch.*

FEINBERG, *Circuit Judge:*

The United States seeks to appeal from a pre-trial order of the United States District Court for the Eastern District of New York, Jack B. Weinstein, *J.*, dismissing an indictment against appelles on the ground that a mistrial declared in a prior trial on the same indictment was unwarranted, and that reprosecution would violate the double jeopardy clause of the fifth amendment. Under the recently amended Criminal Appeals Act, 18 U.S.C.A. § 3731 (1972-73 Supp.), the Government may appeal from an

> order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

We thus must answer two questions. First, does the language of section 3731 prevent an appeal by the Government? And second, was Judge Weinstein correct in holding that the double jeopardy clause barred a second trial? For reasons which follow, we conclude that an appeal does lie to this court from the order below, and, further, that the indictment was erroneously dismissed. Accordingly, we reverse and remand for further appropriate proceedings.

I

On January 7, 1972, appellees were indicted in the Eastern District of New York, on 20 counts charging various violations of federal internal revenue laws, 26 U.S.C. §§ 7201, 7206, and conspiracy to violate those provisions.[1] Trial commenced on September 5, 1972, before Judge Orrin G. Judd. Jury deliberation began on the morning of October 5.[2] The jury was excused for the evening after failing to reach a verdict with respect to any defendant on any count. That evening, Judge Judd had a brief exchange with Juror No. 2 (Mrs. Rappaport), which he related to counsel after jury deliberation had recommenced the following morning. As he explained it, she had asked to see him "on a personal matter." The judge had observed her "sniffling" and "quite ill at ease during the day" and he "started commiserating with her on her illness." She replied that she was "all right" but just felt "incapable."

At 11:30 A.M. on this second—and last—day of deliberation, the jury requested and received a re-reading of the charge. At 3:10, the jury sent a note to the judge stating it was

> apparently not able to reach a unanimous verdict on any count except number 20. Please advise.

After discussion with counsel, the judge indicated that he intended to tell the jury to deliberate "another couple of hours," but doubted that he would ask them to come back on Tuesday.[3] Defense counsel first objected to

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[1] Count 5 of the indictment was later dismissed and was replaced by a superseding information.

[2] At the outset, the jury's deliberation involved 18 counts, defendants having successfully moved for acquittal on counts 16 and 19.

[3] The second day of deliberation was a Friday. Monday, October 9, 1972 was Columbus Day.

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> your Honor saying that they should be returned for deliberation for a couple of more hours because it may well be that what that amounts to is an incarceration against their will

and then pointed out with respect to requiring the jury's return on Tuesday:

> There would be Friday night, all day Saturday, all day Sunday, all day Monday. So there would be three full days and four nights of separation during which it would be impossible to avoid pollution of the jury . . . .

Judge Judd then called the jury back into the courtroom and told them that he would ask them "to go back and to consider further and tell me whether further deliberation would be useful," although he pointed out that he did not intend to have them stay "late tonight" or return on the following Tuesday. He then gave what the Government accurately describes as a modified "Allen charge." Thereafter, defense counsel moved for a mistrial on the ground that the jury was in "deadlock, which apparently is a hopeless one." The motion was denied.

At approximately 5 o'clock, the jury foreman sent a second note, which said:

> [A]fter reviewing most of the testimony and raising what arguments and persuasion we could bring to bear, Mrs. Rappaport has insisted that under no circumstances can she vote guilty on any of the Counts.

Judge Judd thereupon stated his view that this meant "a disagreement on seventeen counts" and resolved to "bring the Jury in and see." The jury was brought in; they announced a verdict of not guilty on count 20, involving only appellee Goldstein, and were polled at the

Government's request. The judge then asked: "And it's clear that you are in disagreement on the rest of the counts?", to which the foreman replied "I am afraid so." The judge then continued:

> I appreciate the time you have put in, the effort that's been made. I might have given a more coercive charge, but I thought it was improper. I think we should respect the conscience of anybody on the Jury.
>
> I would like to keep you for five or ten minutes just to give you a little picture of things behind the scenes. You are entitled to wonder about what happened at all these side bars, and this has been only an income tax case. But it has been an important case for everybody.
>
> You have heard some of the best defense counsel in this City for the last five weeks. The Government attorney is not an ordinary assistant U.S. Attorney. . . .

The judge then went on to disclose, among other things, that the government attorney was from the Organized Crime section of the Justice Department, that defendant Goldstein's tax returns disclosed income from gambling, and that certain defendants had threatened a witness prior to the trial. Counsel took vigorous exception to these comments—a concern which we share—and moved to dismiss the indictment. The motion was denied.

The case was set for retrial before Judge Weinstein, but prior to trial, defendants moved to dismiss the indictment principally on the ground of double jeopardy. The judge granted the motion; while his order of January 8, 1973 dismissing the indictment contained no express findings, the bases for the order were carefully stated during the course of the hearing held on the motion. We set these out extensively:

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. . . I am particularly impressed with the transcript of October 6, 1972 [the second day of jury deliberation described above] at 5:00 o'clock P.M.

The Court said there is "still disagreement on all but one count." There is no indication that disagreement was fixed or that there could not be some agreement had there been further consultation. There were 18 counts undisposed of at that time. Many of them involved a number of defendants and all of them involved at least two defendants.

The Jury was then polled on Count 20 and the defendant in that count was found not guilty. There's no inquiry made by the Court as to whether the Jury wished to consult further with each other. There is no indication that they disagreed with respect to each defendant on each count. In fact, it is not clear that they had considered in any detail each defendant as to each count.

Immediately after the Jury was polled, the Judge began to address the Jury and there would be nothing from which their counsel could determine the nature of the remarks that would be made up until line 15 of page 6 of the transcript. Then reference is made to the organized crime section of the Department of Justice. Thereafter very quickly there is reference to highly prejudicial material which undoubtedly had taken counsel by surprise and it would be only at that point I would think that the normal practice was not going to be followed, that inquiry was not going to be made to the Jury with respect to whether they might possibly reach an agreement given more time or whether they might possibly reach an agreement on any of the counts as to any of the defendants.

• • •

> I must reluctantly conclude that the Court acted without proper consultation with the attorneys and without proper consultation with the Jury and that the case was improperly taken from the Jury at this point without the consent of the defendants and before it had been determined that no agreement could be reached.
>
> Under the circumstances, therefore I reluctantly find that defendants should be placed in double jeopardy if they were to be tried . . . .

From the subsequent order dismissing the indictment, the Government appeals.[4]

II

At the outset, appellees claim that the Government cannot appeal from Judge Weinstein's order dismissing the indictment on double jeopardy grounds. The 1970 amendments to the Criminal Appeals Act, enacted as Title III, §14 of the Omnibus Control Act of 1970, P.L. 91-644, 84 Stat. 1880, 1890, 91st Cong., 2d sess., were designed to eliminate much of the tortuous statutory construction, e.g., *United States* v. *Sisson*, 399 U.S. 267 (1970), and *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (9th Cir. 1959) (en banc), to which federal courts had been put in interpreting the coverage of the predecessor act. See S. Rep. No. 91-1296, 91st Cong., 2d sess., at 2 (1970). But a principal purpose of the amendments was to broaden considerably those situations in which the Government could

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4 The statute, 18 U.S.C.A. §3731, provides that:

> The appeal . . . shall be taken within thirty days after the . . . order has been rendered and shall be diligently prosecuted.

The Government's notice of appeal was filed on February 1, 1973, within 30 days of Judge Weinstein's order dated January 8. The Government's brief, however, was not filed until March 12, nearly six weeks after the notice of appeal. In view of the statutory command of diligent prosecution, we believe that the Government's brief in appeals of this sort should ordinarily be filed within 30 days after the notice of appeal. Cf. Local Appellate Rule §34(f).

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appeal. Id. [5] While the predecessor act was to be strictly construed against the Government's right to appeal, e.g., *United States* v. *Sisson, supra,* 399 U.S. at 291, the present statute expressly directs that its provisions "shall be liberally construed to effectuate its purposes."

Appellees do not—and cannot—dispute this reading of statutory purpose. They contend, nonetheless, that the plain language of the 1970 amendments forecloses our appellate jurisdiction. Any need to undertake a detailed refutation of this assertion has been obviated by this court's recent opinion in *United States* v. *Castellanos,* slip op. 3285, 3287-88 (2d Cir. May 4, 1973). Like this case, *Castellanos* involved an appeal from an order dismissing an indictment on grounds of double jeopardy prior to the impaneling of a new jury. In holding that order appealable, Judge Smith observed that such an order was plainly appealable under the predecessor statute in light of *United States* v. *Jorn,* 400 U.S. 470 (1971), and that "[n]othing in either the legislative history *or the language* of the new statute . . . indicates the slightest intention to cut back the scope of former § 3731. Indeed, quite the opposite seems true . . . ." (Emphasis added.)[6] The same conclusions govern here.

Appellees further contend, however, that Judge Weinstein's dismissal was, "as a matter of substantive law, tantamount to an acquittal." There is no merit to the argument. *United States* v. *Hill,* 473 F.2d 759 (9th Cir. 1972), on which appellees rely, is not in point. *Hill* involved indictments charging the sending of obscene advertisements through the mail. Defendants' motion to dismiss the indictments was granted on the ground that the advertisements

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5 The amendments also eliminated direct appeals to the Supreme Court, lightening the caseload of the Court. S. Rep., supra, at 13-18.

6 In addition to Judge Smith's persuasive analysis, see S. Rep., supra, at 7-9, 12, which details the reasons for the change in language.

were not obscene as a matter of law. In finding reprosecution prohibited by the double jeopardy guarantee, the court noted that the judge had received evidence limited to a necessary element of the offense; the dismissal thus decided the general issue of guilt and was the equivalent of a directed acquittal. See *United States* v. *Sisson,* supra, 399 U.S. at 290 n.19; *United States* v. *Ponto,* 454 F.2d 657, 663-64 (7th Cir. 1971) (en banc). Judge Weinstein's dismissal, by contrast, in no sense turned on the general issue of guilt or required the taking of evidence remotely related to any element of the crime.[7]

Thus, the Government's appeal is properly before us, and appellees' motion to dismiss the appeal is denied.

III

We turn now to the merits of Judge Weinstein's dismissal order. Plainly, technical jeopardy had attached in the trial before Judge Judd because the jury had been impanelled, but equally plainly, as a century and a half of cases illustrate, that did not end the matter. See *United States* v. *Perez,* 22 U.S. (9 Wheat.) 579 (1824); *Illinois* v. *Somerville,* 41 U.S.L.W. 4319, 4320 (U.S. Feb. 27, 1973). What would have ended the matter, however, was defendants' consent to Judge Judd's order declaring a mistrial. See *United States* v. *Gori,* 282 F.2d 43, 47 & n.5 (2d Cir. 1960), aff'd, 367 U.S. 364 (1961); cf. *United States* v. *Jorn,* supra, 400 U.S. at 485. We conclude that defendants did so consent.

On the afternoon of the second day of deliberation, the jury notified Judge Judd that it was "apparently not able to reach a unanimous verdict on any count except number 20"; the judge then gave a modified "Allen charge." De-

7 Appellees also rely on *United States* v. *Oppenheimer,* 242 U.S. 85, 87-88 (1916), but the case is patently inapposite on its facts and rationale.

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fense counsel immediately moved for a mistrial because the jury was hopelessly deadlocked. Had the judge granted this request, of course, no meritorious double jeopardy claim could later have been made. See *United States* v. *Tateo*, 377 U.S. 463, 467 (1964). We are at a loss to understand what transpired thereafter to breathe life into such a claim. Defendants argue that the situation was completely changed less than two hours later by the jury's second note. At that point, according to defendants, counsel realized that they had a favorable jury, that "at worst there would be a hung jury," and that they "decided they did not want a mistrial." [8] The initial problem with this position is that defense counsel did not communicate this change in attitude to Judge Judd. Defendants now argue, as they successfully did before Judge Weinstein, that they never had an effective chance to make their new position known to Judge Judd. We do not understand why that is so, as a recounting of the events of that afternoon indicates.

After the judge read the second note to defense counsel, he stated that this "means a disagreement on seventeen counts. We will bring the Jury in and see." The jury then came back to the courtroom and reported its verdict of not guilty on count 20; each juror was then polled on that verdict. On completion of the polling, the foreman confirmed to the judge that the jury was "in disagreement on the rest of the counts." As anyone familiar with trial court procedure knows, all of this took considerable time. It was certainly sufficient for defense counsel, whose performance up to that time had not been marked by excessive timidity, to make their changed views known to the court. Nor was that all. Judge Judd did not immediately launch into his behind-the-scenes discussion which, defendants correctly maintain, made it impossible for the

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8 Brief for Appellees Goldstein, et al., at 14.

same jury to continue. Instead, the judge took another moment or two in introductory remarks—at which point his intention to order a mistrial became plain—before characterizing the government attorney as "not an ordinary assistant," but from "the section on Organized Crime." This interlude gave defense counsel yet another chance to say that they did not want a mistrial. It is thus apparent to us that defense counsel had adequate opportunity to disabuse the judge of the idea that they still wanted the jury discharged because it was deadlocked; Judge Weinstein's contrary view is not supportable.[9]

Judge Judd obviously assumed that defendants continued to favor mistrial. Certainly, he would not have proceeded as he did had he thought the trial was to continue before the same jury. There was ample warrant for the judge's assumption. Less than two hours before, defense counsel had characterized a proposed instruction to the jury to deliberate "for a couple of more hours" as "incarceration against their will," and had opposed requiring the jury to continue after the weekend recess because "it would be impossible to avoid pollution of the jury." In addition, the judge's assumption as to defen-

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9 Toward the end of the morning session of the hearing, Judge Weinstein stated:

> [A] mistrial was granted here at a time when the defendants . . . would have opposed it had they been given an adequate opportunity to be heard.

In the course of his remarks set forth earlier in this opinion, he again commented that Judge Judd had acted "without proper consultation with the attorneys . . . ." Even if this be a finding of fact, we believe that it must be set aside, regardless of whether the "clearly erroneous" standard applies. We doubt that it does, however. While the "clearly erroneous" standard is applicable to analogous findings in criminal cases, see 8A Moore's Federal Practice ¶ 41.09, at 97, Judge Weinstein's view as to the "opportunity to be heard" turned on his reading of the trial transcripts, and these are as available to us as they were to him. Cf. *In the Matter of Beck Industries, Inc.*, slip op. 3179, 3181 n.3 (2d Cir. April 30, 1973) and authorities there cited.

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dants' position was buttressed by common sense. When defendants had earlier moved for a mistrial, they had no way of knowing the jury's vote: It might have been anything from 11-1 for acquittal to 11-1 for conviction. Any one of these possibilities except the last would indicate a jury sentiment more—rather than less—favorable than the 11-1 vote for conviction on all remaining counts revealed by the jury's second note. To all appearance, defendants' position had worsened in the time between the first and second notes. Defendants argued before Judge Weinstein, however, that they were then in a better position because they knew that they could not be hurt, and that

> They could only get a hung jury and it is possible, as it happens in the movies at any rate, that one person can change the minds of eleven other people.

Anything is possible, of course, but the self-serving nature of this hindsight assertion is patent. Moreover, the silence of defense counsel on this issue was even more deafening after Judge Judd had discharged the jury. At that point, defense counsel argued at length that the judge's disclosure of material not in evidence had hopelessly prejudiced defendants, and required dismissal of the indictment. But this claim itself assumed that another trial would be held, a position inconsistent with their present contention that the double jeopardy clause would bar such a trial, because the discharge of the jury had been premature.

We disagree, therefore, with Judge Weinstein's belief that a mistrial was declared without defendants' consent.[10]

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10 Indeed, the record before us is somewhat contradictory as to whether such a finding was in fact made. Judge Weinstein made such a comment at the hearing. On the other hand, in his subsequent order, after stating that "the case was improperly taken from the jury," the judge

Consent need not be express, but may be implied from the totality of circumstances attendant on a declaration of mistrial. *United States* v. *Gori*, supra, 282 F.2d at 46; see *Scott* v. *United States*, 202 F.2d 354 (D.C. Cir.), cert. denied, 344 U.S. 879 (1952); cf. *Raslich* v. *Bannan*, 273 F.2d 420 (6th Cir. 1959) (per curiam). Defendants had moved for a mistrial a scant two hours before one was declared, at the first suggestion of jury deadlock; little, if anything, had occurred thereafter to warrant a belief that their position had changed; and even if it had, they failed to make this change in position known to the trial judge notwithstanding adequate opportunity to do so. See *United States* v. *Pappas*, 445 F.2d 1194, 1199-1200 (3d Cir.), cert. denied, 404 U.S. 984 (1971).[11]

Under these circumstances, their consent to mistrial can be properly implied, Judge Judd did not really act sua sponte, and defendants cannot successfully argue double jeopardy.

IV

In what may be an excess of caution, we turn finally to the argument made by the Government that, even if defendants did not consent to the mistrial, reprosecution was consistent with the policies served by the double jeopardy clause.

In deciding to abort a criminal trial short of a verdict and without a defendant's consent, after jeopardy has at-

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deleted additional language proposed by defendants, i.e., that this was "without the consent of the defendants and before it had been determined that no agreement could be reached . . . ."

[11] We need not go so far as to hold that in the absence of an express objection to discharging the jury, consent is, in effect, to be presumed, see *United States* v. *Phillips*, 431 F.2d 949 (3d Cir. 1970); we believe instead that the failure to object is one of the several probative factors here from which consent may be implied.

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tached, the trial judge is typically afforded "broad discretion," *Illinois* v. *Somerville*, supra, 41 U.S.L.W. at 4321, since he is "best situated intelligently to make such a decision," *Gori* v. *United States*, 367 U.S. 364, 368 (1961). On the other hand, it is recognized that the double jeopardy clause of the fifth amendment safeguards the defendant's "valued right to have his trial completed by a particular tribunal," *Wade* v. *Hunter*, 336 U.S. 684, 689 (1949), which "he might believe to be favorably disposed to his fate," *United States* v. *Jorn*, supra, 400 U.S. at 486. With due regard for this right, as well as for other defendant interests served by the double jeopardy clause, see Note, Double Jeopardy: The Reprosecution Problem, 77 Harv. L. Rev. 1272, 1274 (1964), the Supreme Court has limited that discretion and has occasionally held a second prosecution barred where a trial judge sua sponte and mistakenly had declared a mistrial. See *United States* v. *Jorn*, supra; *Downum* v. *United States*, 372 U.S. 734 (1963). In defining standards for the exercise of discretion in this sort of case, the Court has continually adhered to the formulation of Justice Story in *United States* v. *Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824):

> [T]he law has invested Courts of justice with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all the circumstances into consideration, there is manifest necessity for the act, or the ends of public justice would otherwise be defeated.

Beyond these general guidelines, the Court has emphasized, each case must turn on its own facts. E.g., *Illinois* v. *Somerville*, supra, 41 U.S.L.W. at 4321.

Turning to the facts in this case, *Perez* itself and *Logan* v. *United States*, 144 U.S. 263, 297-98 (1892), among others, establish that a jury's genuine inability to agree on a

verdict constitutes "manifest necessity" warranting the declaration of a mistrial. See *United States* v. *Lansdown*, 460 F.2d 164, 168 (4th Cir. 1972). Requiring a jury to continue deliberations despite genuine and irreconcilable disagreement more often than not defeats the ends of public justice; not only will such compulsion needlessly waste valuable judicial resources, it may coerce erroneous verdicts. On this view of the case, the only question presented to us, therefore, is whether Judge Judd abused his discretion in concluding when he did that the jury was in fact genuinely hung.

The question is a close one. Judge Weinstein believed that Judge Judd had erred because the trial had been lengthy; the evidence and factual issues were complex, as demonstrated by the jury's request to have the charge reread; the jury had only deliberated eight hours even though there were almost 50 possible verdicts to render and no indication that agreement was impossible as to all. Finally, Judge Weinstein felt that no sufficiently in-depth attempts had been made, in accord with "the normal practice," to ascertain the scope of disagreement among jurors, or to determine whether further deliberation might produce some agreement. These are appropriate factors to consider. See ABA, Project on Minimum Standards for Criminal Justice, Trial by Jury § 5.4(c); (approved draft 1968); id. at 156-57.

Nonetheless, "taking all the circumstances into consideration," as *Perez* requires, we are left with the firm conviction that Judge Judd committed no error. The complexity of a case and the amount of time requested by 12 reasonable jurors to reach unanimity on some or all of many possible verdicts are determinations best left to a trial judge and are difficult to gauge by another district judge or by appellate judges on a cold record. The jury twice reported itself unable to agree—in the second instance, less

than two hours after the first and after a modified Allen charge in which the judge had instructed the jury to tell him "whether further deliberation would be useful." The second note itself appears to answer the question in the negative and suggests growing frustration on the part of the jurors. Indeed, the second note and final oral response of the jury foreman were unequivocal in tone: Mrs. Rappaport could vote guilty "under no circumstances" and it was "clear" that they were in disagreement on all counts. With the dissenting juror so identified, Judge Judd was entitled to recall his conversation with her on the previous evening, and to conclude that her previously vague reference to feeling "incapable" meant that she was in fact unable or unwilling to vote guilty.

Appellees call our attention to but one case in which the trial court's erroneous decision to order mistrial due to an apparently hung jury has been held to bar reprosecution. *United States* v. *Lansdown*, supra. Our research has disclosed no other federal case. But cf. *Commonwealth* v. *Baker*, 196 A.2d 382 (Pa. 1964) (premature discharge of jury bars retrial on state constitution double jeopardy ground). This itself suggests how rarely the informed judgment of a trial court is disturbed in these or similar circumstances. Moreover, factual differences between this case and *Lansdown* are striking. In *Lansdown*, the trial judge ordered a mistrial solely because he felt that the many hours of jury deliberation after a one-day trial had been long enough.[12] The court of appeals noted that no rule of thumb in terms of hours deliberated could be extrapolated from precedent. 460 F.2d at 169 & n.2. Of far more significance, however, the jury foreman had told the *Lansdown* trial judge, immediately before mistrial was

12 The trial judge referred to "20 hours" of deliberation. The court of appeals pointed out, "In fact, the jury had deliberated slightly in excess of 11 hours." 460 F.2d at 168 n.1.

declared, that they were "on the verge" of a verdict; another juror took it upon himself to request an additional ten minutes of deliberations. In light of this, the trial judge's action was arbitrary and manifestly an abuse of discretion. In this case, on the other hand, no member of the jury ever suggested that any verdict was remotely possible. We believe that Judge Judd could have reasonably concluded that the jury was hopelessly deadlocked.[13] If so, it follows that there was manifest necessity for declaring a mistrial and that doing so was not an abuse of discretion.

Reversed and remanded for further proceedings consistent with this opinion.

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13 Cf. the standard proposed by § 5.4(e) of the ABA Minimum Standards, supra, defining the scope of a trial judge's discretion to declare a mistrial sua sponte:

> The jury may be discharged without having agreed upon a verdict if it appears that *there is no reasonable probability of agreement.* (Emphasis added.)

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 680—September Term, 1972.

(Argued April 10, 1973 Decided May 4, 1973.)

Docket No. 72-2337

UNITED STATES OF AMERICA,

Appellant,

v.

LUIS CASTELLANOS,

Appellee.

Before:

SMITH, HAYS, and TIMBERS,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge,* ordering dismissal of indictment on grounds of double jeopardy.

Reversed.

PAUL B. BERGMAN, Asst. U.S. Attorney (Robert A. Morse, U.S. Attorney for the Eastern District of New York, L. Kevin Sheridan, Asst. U.S. Attorney, of counsel), *for Appellant.* . .

FRANK T. GEOLY, Brooklyn, N.Y. (Fontana & Geoly, Brooklyn, N.Y.) *for Appellee.*

SMITH, *Circuit Judge:*

This appeal presents a single substantive question—may a district court order the dismissal of an indictment on grounds of double jeopardy solely because two previous trials of an accused have resulted in deadlocked juries? Judge Dooling answered that question in the affirmative, and ordered the indictment against Luis Castellanos dismissed. For the reasons below, we reverse.

The relevant facts may be quickly stated. The underlying indictment alleges a conspiracy to sell cocaine. The main government witness at both trials was Horace D. Balmer, a New York City undercover detective, who testified about appellee's involvement in the alleged conspiracy. At each trial, the defense was presented wholly through the testimony of the defendant himself, who denied any narcotics dealings, and a number of character witnesses. The first jury was discharged after it deadlocked 11 to 1 for conviction; the second after it split 7 to 5 for acquittal.

After the second mistrial, appellee moved for a judgment of acquittal pursuant to Rule 29(c), Fed. R. Crim. P., and "for such other and further relief as to this Court may seem just and proper." Judge Dooling, in a written memorandum, denied the motion for acquittal, noting that there "was unmistakably an issue for the jury to resolve." However, concluding that he had the power to grant a motion to dismiss where there had been two previous jury disagreements and the record indicated no special circumstances contributing thereto in either trial, Judge Dooling ordered the indictment dismissed on grounds of double jeopardy. It is this order from which the government appeals.

I.

At the outset, appellee confronts us with a claim that we lack jurisdiction over the appeal. He bases his argument upon the language of 18 U.S.C. §3731, which provides:

> "In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

Castellanos contends that since Judge Dooling held that further prosecution was barred by the Double Jeopardy Clause, the statute forbids appeal.

We cannot accept appellee's argument, which would have the effect of making the district courts the final arbiters of the constitutional meaning of the Clause. An order such as the one here, dismissing an indictment on grounds of double jeopardy prior to the impaneling of a new jury, was clearly appealable under the predecessor to the present §3731. *United States* v. *Jorn*, 400 U.S. 470 (1971). Nothing in either the legislative history or the language of the new statute, Pub. L. 91-644, Title III, §14(a), 84 Stat. 1890, indicates the slightest intention to cut back the scope of former §3731. Indeed, quite the opposite seems true, for the statute was described as designed to eliminate "technical distinctions in pleadings as limitations on appeals by the United States," Conference Rep. No. 91-1768, 91st Cong., 2d Sess.; 1970 U.S. Code Cong. & Admin. News at 5848, and the text of the law itself instructs us that its "provisions shall be liberally construed."

The reference to the Double Jeopardy Clause in the statute, rather than barring appeal in a case like this, seems

designed to meet the unrelated problem posed by the Supreme Court's interpretation of the old Criminal Appeals Act in *United States* v. *Sisson*, 399 U.S. 267 (1970). There, the Court construed a provision that allowed appeals "From the decision or judgment sustaining a motion in bar, where the defendant has not been put in jeopardy,"

> "... as confining the Government's right to appeal ... to situations in which a jury has not been impaneled, even though there are cases in which a defendant might constitutionally be retried if appeals were allowed after jeopardy had attached." *Id.* at 302-3.

The Court explicitly rejected Mr. Justice White's position that the statutory language merely restated the prohibition of the Fifth Amendment, holding instead that the statute forbade appeals from rulings made after jeopardy *attached*, regardless of whether or not retrial would have been constitutionally barred after appellate review. *Id.* at 304-6.[1]

The new statute was apparently aimed at this dilemma, seeking to make the government's right to appeal coextensive with its ability to retry the defendant if its arguments on the merits should prevail on review. *Id.* at 306-7, n. 61. But of course, the government's ability to retry Castellanos is precisely what is at issue here. At worst then, we lack

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1 The distinction may be illustrated by the following hypothetical. Assume that after a jury was impaneled, the trial court declared a mistrial because he thought the day too sunny to spend indoors. Surely, if the order were appealable, a reviewing court would have little difficulty finding it in error. Yet a defendant might well contend that retrial was barred by the Fifth Amendment, since jeopardy had attached upon impaneling of the jury and there was no "manifest necessity" for declaration of a mistrial. See the discussion in Part II, *infra*.

Under the prior §3731, the Fifth Amendment question would be irrelevant, for *Sisson* held appeals to be barred by the *attaching* of jeopardy, i.e., the impaneling of the jury. Under Mr. Justice White's interpretation (and present §3731), the Fifth Amendment question would have to be resolved to determine appealability—if retrial was barred, the appeal should be dismissed, if not, jurisdiction existed to reverse the order.

jurisdiction and must dismiss only if Judge Dooling's ruling is correct, and conversely, if the order below is in error, we have jurisdiction and must reverse. In short, the question of our jurisdiction is bound up with the merits, and it is to these that we now turn.

II.

As the Supreme Court has recently reminded us in *Illinois* v. *Somerville*, —— U.S. ——, 41 U.S.L.W. 4319, 4320 (Feb. 27, 1973), the "fountainhead decision construing the Double Jeopardy Clause in the context of a declaration of a mistrial" is *United States* v. *Perez*, 9 Wheat. (22 U.S.) 579 (1824). In that case, speaking for a unanimous Court, Mr. Justice Story held that where a jury is properly discharged for failure to agree upon a verdict and a mistrial declared, the defendant may be put to a new trial without violating the Double Jeopardy Clause:

> "We think, that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere." *Id.* at 580.

This "manifest necessity" standard has been "consistently adhered to," *Somerville, supra,* 41 U.S.L.W. at 4321, by the Supreme Court in the nearly one hundred and fifty years since *Perez*. Thus, the essential question in each case involving double jeopardy contentions after the declaration of a mistrial has been whether the trial judge abused his

discretion in terminating the trial short of verdict. If so, retrial is barred. As might be expected, since trial judges may declare mistrials for a variety of reasons, the inquiry is a factual one, and the Supreme Court has often sharply divided on the issue of whether a particular mistrial declaration meets the "manifest necessity" standard. *See, e.g., Wade* v. *Hunter*, 336 U.S. 684 (1949); *Gori* v. *United States*, 367 U.S. 364 (1961); *Downum* v. *United States*, 372 U.S. 734 (1963); *United States* v. *Jorn, supra; Illinois* v. *Somerville, supra.* But at least two common threads run through all these cases: the recognition that the *Perez* doctrine defines the parameters of analysis, and the agreement that the "classic example" of "manifest necessity" is the discharge of a genuinely deadlocked jury. *Downum, supra*, 372 U.S. at 736.

Had Castellanos here claimed that one or both of the mistrials were improperly declared, his double jeopardy claim would be within the analytical framework of the "manifest necessity" formulation. *Perez* warns that such mistrials should be declared only "with the greatest caution, under urgent circumstances, and for very plain and obvious causes," 9 Wheat. (22 U.S.) at 580. If it appeared here that there was no "manifest necessity" for the mistrials—that the trial judge acted too quickly, or that it seemed that the jury was not really deadlocked—we might well be able to hold that the Double Jeopardy Clause barred retrial. But such is not the case here. Judge Dooling noted, and neither side disagrees, that the jury deadlocks were genuine, and that there was no sense in leaving the case in either panel's hands any longer. Indeed, Castellanos does not appear to have objected to either mistrial declaration.

Thus, since each mistrial here concededly met the "manifest necessity" test, any claim of double jeopardy would appear to be barred by *Perez* and its progeny. Judge Dool-

ing attempted to distinguish *Perez*, however, on the ground that but one mistrial was there involved. He noted that the Double Jeopardy Clause is designed not only to protect against double punishment, but also against the risk of multiple trials for a single offense. *Price* v. *Georgia*, 398 U.S. 323, 326 (1970). Judge Dooling recognized, as has the Supreme Court on repeated occasions, that a criminal trial represents a heavy personal strain for a defendant, and that an accused has an important interest in getting a final verdict out of the first jury he faces. *See Jorn, supra*, 400 U.S. at 479 (opinion of Harlan, *J.*); *Green* v. *United States*, 355 U.S. 184, 187-88 (1957). Since these policies behind the Double Jeopardy Clause were threatened by the prospect of a third trial here, Judge Dooling ruled that the Fifth Amendment required dismissal.

We cannot agree. It is obvious that the defendant's interest in a final determination before the first jury he faces is not the only one here. If that were so, *Perez* would bar even the second trial, and contrary to the rule of *United States* v. *Ball*, 163 U.S. 662 (1896), there would be no retrials after appellate reversals. But the cases clearly recognize that the accused's right to a quick determination on the merits may in some instances be outweighed by the "ends of public justice," *Perez, supra*, 9 Wheat. (22 U.S.) at 580, or put another way, "the public's interest in fair trials designed to end in just judgments," *Wade* v. *Hunter, supra*, 336 U.S. at 689.

Judge Dooling recognized this tension between the rights of the accused and the public interest, and held that the appropriate balance was struck by limiting the government to two bites at the apple, at least where it appeared that no new evidence would be introduced at a third trial. But such an approach is the kind of "mechanical application of an abstract formula" that the cases condemn. *Wade, supra*, 336 U.S. at 691. *See also, Illinois* v. *Somerville, su-*

pra. Indeed, the Supreme Court decisions make it clear that it is the *Perez* standard itself which embodies the appropriate balancing test—the defendant's interests bar retrial in all but those instances where there is "manifest necessity" for taking the case away from the jury. Since each mistrial was properly declared here, the Perez formulation tips the balance in the government's favor, and does not constitutionally bar retrial. *Accord, People* v. *Baker,* 70 Misc. 2d 986, 335 N.Y.S.2d 487 (Sup. Ct. 1972). *Cf. United States* v. *Berniker,* 439 F.2d 686 (9th Cir.), *cert. denied,* 404 U.S. 938 (1971).[2]

Even assuming arguendo that we could step outside the *Perez* test and invoke the Double Jeopardy Clause simply because a certain number of mistrials had occurred, we would still conclude that reversal is mandated here. If the appropriate interest of the defendant to be weighed is the avoiding of the harassment and strain of multiple prosecutions, the situation where the first and second trials end in deadlocked juries is hardly distinguishable from the case where the third trial occurs after one or more appellate reversals. Yet, in *Keerl* v. *Montana,* 213 U.S. 135 (1909), the Supreme Court has held that the Double Jeopardy Clause is not violated by retrial after a jury deadlock and an appellate reversal of a conviction. And, in *United States* v. *Persico,* 425 F.2d 1375, 1385 (2d Cir.), *cert. denied,* 400 U.S. 869 (1970), we upheld a fifth trial of several criminal defendants, following two appellate reversals and two mistrials.[3]

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2 *But see Preston* v. *Blackledge,* 332 F. Supp. 681 (E.D.N.C. 1971), where the district court held that double jeopardy barred a retrial of state criminal defendants after four deadlocked juries. While we doubt the correctness of the case's reasoning, it is distinguishable from the one at hand on the basis of numbers, if nothing else.

3 Indeed, a tracing of the labyrinthine *Persico* proceedings indicates that at least one of the defendants, Hugh McIntosh, was tried the fifth time after *two deadlocked juries* and two reversals. The first trial

Moreover, to the extent that factual measurements of the strain of multiple prosecution are possible, this case does not present a particularly unhappy picture. In contrast to the *Persico* defendants, whose first trial took place in 1961 and whose fifth trial took place in 1968, appellant here was first tried in March of 1972, and retried in August of that year. Each trial took only about three days, the defendant's case rested wholly upon his own testimony and that of character witnesses, and the entire question for the jury was one of credibility. Even assuming that the Double Jeopardy Clause can in some case be invoked solely because of repeated jury disagreements—an assumption we do not here make—this is not that case.[4]

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on the indictment involved Carmine J. Persico, Jr., Salvatore Albanese, Ralph Spero, George LaFante, Joseph Magnasco, and McIntosh, and ended in a jury disagreement. The second trial resulted in convictions of all six; Magnasco was killed before sentencing, and we reversed the remaining convictions because of trial errors. 305 F.2d 534 (1962). The third trial ended in a mistrial on the eighth day as to Persico, Albanese, and Spero, after Persico was shot and wounded. The trial went to conclusion as to McIntosh and LaFante, but the jury disagreed. The fourth trial resulted in the conviction of all five remaining defendants, but we reversed again, for errors in the charge. 349 F.2d 6 (1965). The fifth trial again resulted in convictions of all but LaFante, whom the trial judge ordered acquitted for insufficient evidence.

So, at the end of the process, Persico, Albanese, and Spero were tried the fifth time after two appellate reversals, one deadlocked jury, and one other mistrial; McIntosh's fifth trial came after two deadlocked juries and two reversals. Thus, even if retrials after jury disagreements might somehow be distinguished from those following appellate reversals or other mistrials, at least one *Persico* defendant was retried after not only the two disagreements on which appellee bases his claim, but two reversals to boot.

4 We recognize that a strict application of the *Perez* analysis would lead to the conclusion that *any* number of retrials after jury disagreements did not violate the Double Jeopardy Clause, so long as the "manifest necessity" doctrine was met in declaring each mistrial. However, it would still remain open for the defendant to argue that such a "trial by attrition" violated the Due Process Clause. *Cf. United States* v. *Marion*, 404 U.S. 307 (1971), holding that no amount of pre-indictment delay, however large, justified dismissal under the Speedy Trial Clause,

In short, while we commend Judge Dooling's sensitivity to the rights of the accused, we cannot agree with the order below. Reversed.[5]

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but leaving open the possibility of due process objections upon a showing of prejudice.

5 Of course, nothing we say today *requires* a third trial. The point may well have been reached in this case where the government should properly conclude that further efforts at convicting Castellanos will be unproductive, or a poor use of overburdened resources. All that we hold is that a retrial is not constitutionally prohibited.